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What Was Wrong with the Record?

Ellen D. Katz

SHELBY COUNTY V. HOLDER offers three reasons for why the record Congress amassed to support the 2006 reauthorization of the Voting Rights Act (VRA) was legally insufficient to justify the statute's continued regional application: (1) the problems Congress documented in 2006 were not as severe as those that prompted it to craft the regime in 1965; (2) these problems did not lead Congress to alter the statute's pre-existing coverage formula; and (3) these problems did not exclusively involve voter registration and the casting of ballots.¹ These observations may all be true, but that they, individually or collectively, suffice to establish the record's inadequacy in this case is both a novel and a potentially far-reaching holding.

Shelby County invalidates Section 4(b) of the VRA, a provision that "covered" jurisdictions if they utilized a "test or device" as a prerequisite to voting and had low levels of voter participation on specified dates between 1964 and 1972.² Once covered, jurisdictions could no longer use their test or device and could not implement any electoral changes without first showing that the proposed change would be nondiscriminatory. *Shelby County* deems 4(b) obsolete, and concludes that nothing in the 15,000 pages of evidence Congress amassed in support of the VRA's reauthorization justifies continued utilization of the coverage formula. Much of the novelty and magnitude of the decision lies in the majority's reasons why.

The first reason concerns the severity of the problems documented in the record. Chief Justice Roberts' majority opinion observes that "[r]egardless

of how to look at the record...no one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time."³

The Chief Justice is certainly correct about this fact. To be sure, his opinion gives short shrift to the role of deterrence and the notable ways this operational regime had previously shaped public conduct on the ground. But even if deterrence were to be considered and a good deal of backsliding comes to pass—the early signs in this regard are not encouraging—no one anticipates Jim Crow will return full force now that the preclearance regime has been rendered inoperative. Backsliding may well prove to be "pervasive,' 'flagrant,' 'widespread,' and 'rampant,'" but the brazen defiance of constitutional norms that defined the pre-VRA South will not. Whatever happens, and a good deal of it may be ugly, it will not rise to the level of what prompted statute in first place.

That's good news, as far as it goes, but the notion that misconduct so severe might be necessary to sustain the preclearance regime is astounding. Justice Ginsburg's dissent argues that contemporary unconstitutional conduct in covered jurisdictions remains widespread, particularly considering the preclearance regime's documented deterrent effect.⁴ The majority likely disagreed, thinking that the cited conduct sounded more in discriminatory effect than intent or simply tracked a jurisdiction's

¹133 S. Ct. 2612, 2629, 2630–31 (2013).

²42 U.S.C. § 1973b(b).

³133 S. Ct. at 2629.

⁴*Id.* at 2639–42 (Ginsburg, J., dissenting).

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inability to disprove animus. And yet, the majority opinion notably declines to dispute Justice Ginsburg's characterization of the evidence including the scope of unconstitutional conduct she describes.

Instead, the majority stakes out what appears to be a new, constitutionally significant line between what we might call contained and extreme unconstitutional conduct. *Shelby County* suggests that Congress may employ a remedy like preclearance only to reach the extreme Jim Crow variety, but not to address the more contained type of unconstitutional conduct we see today. That is, it suggests that Congress may not select what it reasonably believes is the most effective way to remedy unconstitutional racial discrimination in voting when that discrimination falls short of the type that defined Alabama in 1965.

It is decidedly new law to hold that Congress lacks this power. Such a holding departs not just from Warren Court precedent, which recognized that Congress possesses close to plenary authority when crafting remedies for unconstitutional racial discrimination in voting.⁵ It also departs from Rehnquist Court precedent, which required a tight connection between remedies and unconstitutional conduct but did not distinguish between worthy and less worthy constitutional violations.⁶

And yet, *Shelby County* does not rest exclusively on this distinction. The decision posits a "more fundamental problem" with the record. Specifically, the record "played no role in shaping the statutory formula before us today."⁷ The Court explains that Congress opted to "reenact[]" the original coverage formula when it reauthorized the VRA in 2006 and accordingly "did not use the record it compiled to shape a coverage formula grounded in current conditions."⁸

This objection is puzzling. It is true, of course, that Congress did not change the coverage formula in 2006 and that jurisdictions that had been previously covered under that formula remained covered after reauthorization. It is also true that, on a clean slate, a decision to regulate unregulated entities based on voter participation decades ago would be difficult to defend. One might well agree with the Court that "[if] Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula." What is far from clear, however, is why the Court thinks "that is exactly what Congress has done."⁹

Congress was not starting from scratch in 2006. Instead, it was considering whether a remedy every-

one agreed had been lawfully imposed should continue. To answer that question, Congress assembled a detailed record documenting "current conditions" in covered jurisdictions, based on which it concluded the remedy remained necessary in the places where it applied. To be sure, Congress might have decided otherwise. It might have chosen to adjust the scope of coverage either by adding new jurisdictions in which electoral problems appeared significant or by releasing those with relatively clean records. It opted instead to maintain the existing regime and the embedded opportunities to refine coverage through the bailout and bail-in procedures.

There are solid arguments on both sides as to whether the record was adequate to justify the particular reauthorization Congress enacted. And yet, the *Shelby County* majority posits a "fundamental problem" with the record that appears to have little to do with the record's substantive content. Instead, the majority condemns Congress for failing to use the evidence it collected "to shape" a coverage formula. By "shape," the majority presumably means to revise that formula or craft a new one, given that the opinion rejects the idea that Congress might have rationally concluded that current conditions justified preserving the existing coverage formula. The suggestion seems to be that the Constitution required Congress to revise rather than maintain the coverage formula no matter what evidence it documented.

Why? The Court required no such editorial revisions to justify the VRA's 1982 reauthorization, in which Congress also opted to retain the coverage formula unchanged. More critically, *Shelby County* does not explain why Congress's decision to preserve the formula was not "shaped" by the record in the same way a decision to revise it would have been. Nor does the opinion explain why the Constitution might deem this distinction relevant. Put another way, standing alone, the fact that Congress chose to reauthorize the existing formula proves nothing. If the argument is that there is a mismatch between coverage and unconstitutional conduct, the Court would have to consider the record with

⁵See *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

⁶*City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁷133 S. Ct. at 2629.

⁸*Id.*

⁹*Id.* at 2630-31.

greater care. And it would have to confront more openly the deference usually accorded Congress when finding facts.

This brings us to what I am counting as a third objection to the record, albeit one that might have been intended as an illustration of the second. Chief Justice Roberts' opinion observes that the conditions Congress documented in 2006 encompassed issues beyond the act of casting a ballot and dealt largely with "second-generation" barriers such as racial vote dilution. The Chief Justice insists that such barriers are unrelated to the concerns that animated coverage in the original formula. After all, the coverage formula "is based on voting tests and access to the ballot, not vote dilution." As such, the conditions Congress documented in 2006 do not "cur[e]" the problem—namely, that Congress did not use the record to "shape" the coverage formula.¹⁰

Far from clarifying matters, this objection is counterfactual in multiple respects. It is true that, largely because the VRA banned literacy tests, so-called "second-generation" devices became more prominent objects for concern in the 1970s and they remain so today. And yet, "second-generation" problems, such as the practice of manipulating district lines to inhibit minority influence, predate the VRA by decades.¹¹ Such practices stand with the white primary, the literacy test, the poll tax, and other tactics that were used concurrently in the Jim Crow South to ensure that African-American citizens lacked the ability to cast "meaningful" ballots and to "strip" them "of every vestige of influence" in the selection selecting the public officials.¹²

In short, the practices grouped as "second generation" are not unrelated to the concerns that first animated Congress to enact the VRA. They were part and parcel of the practices the original statute targeted. The Supreme Court itself recognized as much in 1969.¹³ Justice Harlan disagreed at the time, and Justices Thomas and Scalia would do so later, but a majority of the Court has repeatedly

recognized congressional intent for the VRA to apply to these practices and confirmed Congress's power to deploy the VRA in this way.

True, the coverage formula invalidated by *Shelby County* was based on the use of tests and devices and low voter participation. But Congress selected those elements as the "trigger" because they captured with remarkable accuracy the places that engaged in the broader range of conduct (including so-called "second generation" conduct) that had rendered the Fifteenth Amendment a nullity throughout the pre-VRA South. The statutory "trigger" linked tests and devices to low participation, but the statute's target was never so limited.¹⁴

As a result, the Court's dismissal of the second-generation evidence as off-topic is difficult to fathom. Indeed, all three reasons *Shelby County* gives for the record's inadequacy are deeply puzzling. To be sure, these reasons may ultimately prove to be of limited consequence. The first might not stand alone, while the second and third concerns might be easily resolved with simple statutory amendments. Alternatively, however, all three may signal deeper skepticism about congressional judgment in this realm and, as such, portend more rigorous examination of congressional action in the future.

Given this uncertainty, *Shelby County* presents a serious challenge for those shaping federal voting rights law going forward. Should a legislative response to the decision prove feasible politically, the contours of what measures might ultimately survive constitutional scrutiny remains far from clear.

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¹⁰*Id.* at 2629.

¹¹*See generally* Quiet Revolution in the South (Chandler Davidson and Bernard Grofman, eds. 1994).

¹²*Terry v. Adams*, 345 U.S. 461, 470 (1953).

¹³*Allen v. Board of Elections*, 393 U.S. 554, 567 (1969).

¹⁴*Id.* at 566–77 (preclearance was meant "to be all-inclusive of any kind of practice," and to be given "the broadest possible scope").